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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

GEORGE R. DOCKING, CHARLES C. CAMPBELL, NORBERT J. SIDOROWICZ, *et al.*, *Petitioners*,

v.

STATE OF KANSAS, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

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IN THE

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OCTOBER TERM, 1975

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GEORGE R. DOCKING, CHARLES C. CAMPBELL, NORBERT J. SIDOROWICZ, *et al.*, *Petitioners,*

v.

STATE OF KANSAS, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

Petitioners George R. Docking, Charles C. Campbell and Norbert J. Sidorowicz, *et al.*,[1] respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Kansas entered in this proceeding on July 17, 1975.

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[1] This petition is also submitted on behalf of petitioners Edwin W. Korff, Jack E. Lakey, M. Gene Norton, Robert B. Jarvis, Donald R. Sledd, Forrest A. Towner, Marshall & Brown of Kansas, and Marshall & Brown-Sidorowicz, P.A.

OPINIONS BELOW

The opinion of the Supreme Court of Kansas is reported at 217 Kan. 756 and at 539 P.2d 329. A copy of the opinion appears in the Appendix at pages 1a-38a. The orders of the Supreme Court of Kansas denying petitioners' motion for rehearing appear in the Appendix at pages 38a-39a, and the mandate of that Court appears in the Appendix at page 40a. The memorandum opinion and judgment of the District Court of Shawnee County, Kansas, appear in the Appendix at pages 41a-50a.

JURISDICTION

The judgment of the Supreme Court of Kansas was entered on July 17, 1975. Timely motions for rehearing were denied on September 12, 1975, and on September 15, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Petitioners established in the courts below that jury lists in the jurisdiction in which they were indicted were derived solely from voter registration records. The trial court, in dismissing the indictment, found on the basis of uncontradicted evidence, which the Kansas Supreme Court did not dispute, that reliance upon such voter registration records resulted in the automatic exclusion from jury service of some 40 percent of the persons otherwise qualified to serve on juries and that those persons so excluded generally consisted of a disproportionately large number of persons who are members of minority races and ethnic backgrounds and of certain fundamentalist religious orders and beliefs, persons of low economic status and low educational levels, women, and the relatively young and the relatively old.

In light of these trial court findings, the question presented in this case is whether the systematic exclusion from jury service of a very substantial minority of persons with such definable racial, ethnic, religious, economic, educational, sexual, and age characteristics, deprived petitioners of their rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to have the grand jury which considered the indictment selected from a fair cross section of the community.

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV to the United States Constitution:

> "Section 1. . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES INVOLVED

3A Kan. Stat. Ann. §§ 155-72 (Petit and Grand Jurors Act of 1971).

Section 155 of the Act reads as follows:

> "43-155. *Jury service; declaration of public policy.* The public policy of this state is declared to be that jury service is the solemn obligation of all qualified citizens, and that excuses from and discharge of this responsibility should be granted by the judges of the courts of this state only for reasons of compelling personal hardship or because requiring service would be contrary to the public welfare, health or safety; that all litigants entitled to trial by jury shall have the right to juries selected at random from a fair cross section of the community in the district wherein the court convenes; and that all citizens shall have the op-

portunity to be considered for service on juries in the district courts of Kansas."

Section 162 of the Act reads as follows:

> "43-162. *Same; preparation of jury lists; revision and updating annually; access to voter registration and census records.* From and after January 1, 1972, all jury lists shall be prepared in accordance with the provisions of this act. . . . Jury lists shall be prepared from voter registration records and enumeration or census records of the county in accordance with the intents and purposes of this act. . . ."

STATEMENT OF THE CASE

This petition arises out of a decision of the Kansas Supreme Court which reversed the trial court's dismissal of an indictment charging petitioners and other co-defendants with violating the Kansas conspiracy statute. In reversing the trial court's decision, the state supreme court rejected the petitioners' claim that the grand jury which indicted them had been selected in violation of both the requirements of the Kansas Petit and Grand Jurors Act of 1971 and the guarantees of the Kansas and United States Constitutions.

On January 22, 1974, a grand jury convened by the District Court of Shawnee County, Kansas, returned an indictment charging petitioners and 12 others with conspiring to bribe a State official in order to influence his decision in awarding an architectural contract with respect to the expansion of the University of Kansas Medical Center in Kansas City, Kansas. (R. 1-12) [2]

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[2] "R." refers to the Record On Appeal before the Kansas Supreme Court. This Record has been filed with the Clerk of this Court.

Following return of the indictment, petitioners, together with the other defendants, moved to dismiss, contending, *inter alia*, that the grand jury had been selected in violation of the Kansas Petit and Grand Jurors Act of 1971 and the Kansas and United States Constitutions in that voter registration records of Shawnee County, Kansas, constituted the sole source of names from which the jury was chosen. (R. 14-18, 185.)

An evidentiary hearing was held by the trial court on the motions to dismiss the indictment. The evidence at that hearing showed the following:

1. Mr. Albert Hatch, the data processing manager charged by the local judiciary with devising Shawnee County's jury lists and developing random selection procedures, testified that, at the time of the selection of the jury lists from which the names of the grand jurors in this case were drawn, there were 75,814 persons on the county voter registration list, while some 50,000 more people who were otherwise qualified for jury service appeared on the county census enumeration rolls, thus resulting in the automatic exclusion of some 40 percent of the population qualified to serve on juries under Kansas law.[3] (R. 50-51, 78.)

2. Dr. Herman D. Lujan, Associate Professor of Political Science at the University of Kansas and Director of the university's Institute of Social and En-

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[3] After petitioners filed their motions to dismiss the indictment, Mr. Hatch was directed to amend the jury selection system so as to use both voter registration lists and census records in compiling jury lists. This action was precipitated by the filing of the petitioners' motions to dismiss the indictment. (R. 53, 62).

vironmental Studies, testified that he had done a number of studies of Kansas voting patterns bearing upon voter participation. (R. 65.) Dr. Lujan concluded that in socioeconomic or class terms there is a significant difference between those who register to vote and those who do not. Registered voters are or tend to be white in ethnic origin; in terms of religious characteristics they are normally what one might call the "higher protestants," Roman Catholic, or Jewish; they tend to be higher educated and of higher or middle income levels; and they tend to be property owners. On the other hand, those who do not register include as a group normally people from minority ethnic backgrounds, women, people who are less educated, people from lower income levels, younger people from 18 to 25, and the very aged. (R. 82). Thus, Doctor Lujan testified that when the jury selection process relies only on voter registration lists there is a disproportionate exclusion of such classes. (R. 66).

3. Thomas Morrill, Director of Data Processing for the Colorado Judicial Department (R. 66), testified in the same vein as Dr. Lujan. Specifically, his testimony was that voter registration "seems to fall into the area of the same people [who] are normally disenfranchised within government, people in the lower economic classes, people in minority classes. Women are slightly less apt to be registered than men. Specifically the least likely person to ever register would be a minority between the age of 21 and 29. Studies have reflected a surprising low rate of like 10 to 20 percent even." (R. 89-90.)

Far from refuting petitioners' showing concerning the exclusion of a large segment of the community

from the grand jury which indicted them, the prosecution offered no evidence whatever in response to the petitioners' proof.

On this state of the record, the trial court dismissed the indictment pursuant to the following findings:

> "The grand jury panel in question was selected solely from the list of all Shawnee County registered voters . . . ." (App. 43a.)
>
> "On January 1, 1973, there were 125,929 citizens eighteen (18) years of age or older residing in Shawnee County, and when the grand jury array was selected in November, 1973, there were 75,814 persons registered to vote." (App. 44a.)
>
> "Registered voters' lists include persons who are or tend to be: white, members of the Jewish, Catholic, Presbyterian and other Protestant and established religious beliefs, well-educated or higher educated citizens than average, middle-age citizens and men. As a class, citizens who are not registered voters include persons who are and tend to be: members of the minority races or ethnic background, women, members of certain fundamentalist religious orders and beliefs, persons of low economic status, persons of low education levels, young citizens basically 18-25 years of age and old citizens." (App. 44a.)
>
> "Irrespective of the lack of intent, the selection of the grand jury array under District Court Rule No. 21 resulted in the exclusion from jury service of a substantial and identifiable group of citizens, namely approximately forty percent (40%) of the qualified electors of Shawnee County; and, therefore, the defendants were denied their statutory

right to have a jury array selected at random from a fair cross section of the community." (App. 46a-47a.) [4]

Following appeal by the State, the Kansas Supreme Court, on July 17, 1975, reversed the trial court's decision dismissing the indictment. The court rejected the trial court's conclusion that the use of only voter registration lists as the source of the grand jury array violated the Kansas Petit and Grand Jurors Act of 1971. (App. 9a-12a.) In essence, the court considered directory rather than mandatory the requirement of Section 162 of the Kansas Act that: "Jury lists shall be prepared from voter registration records and enumeration or census records of the county . . . ." In addition, the court concluded that the use of voter registration lists alone was sufficient to insure petitioners a grand jury "selected from a fair cross section of the community" in accordance with the requirements of the Kansas Constitution and the Fourteenth Amendment of the United States Constitution. (App. 12a-14a.) As a result, the court found that there had been no violation of petitioners' statutory or constitutional rights.[5]

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[4] Because it found the grand jury array to have been selected in violation of the requirements of the Kansas statute, the trial court had no occasion to pass upon petitioners' contention that the array had also been selected in violation of the guarantees of the United States Constitution. (R. 16.) The trial court did, however, cite with approval and rely upon *United States* v. *Burkett*, 342 F. Supp. 1264 (D. Mass. 1972), which condemned on federal constitutional grounds the use of voter registration lists as the sole source of jury lists. (App. 47a-48a.)

[5] As indicated in the text above (p. 5), the federal question of which review is sought by this petition was initially raised in

REASONS FOR GRANTING THE WRIT

This case directly raises an issue—whether juries can constitutionally be composed solely of members taken from voter registration lists or from other lists disproportionately weighted against readily identifiable segments of the community—which has divided the lower federal and state courts. Compare *Leggroan* v. *Smith,* 498 F.2d 168, 170 (10th Cir. 1974), and *United States* v. *Burkett,* 342 F. Supp. 1264 (D. Mass. 1972), with *United States* v. *Lewis,* 472 F.2d 252 (3d Cir. 1973), and the decision below. It does so in the context of a trial court's findings both that the use of such a list resulted in the exclusion of approximately 40 percent of those eligible to serve on jury duty and that such excluded minority generally consisted of a disproportionately large number of members of racial and ethnic minorities and of certain religious groups, women, the propertyless, the uneducated, the very young and the very old. Thus, the case represents a most apt vehicle for the carrying out of this Court's continuing efforts to implement the constitutional guarantee of the right of individuals to have their cases considered by juries selected from a fair cross section of their communities.

1. This Court has consistently held that the Equal Protection Clause is violated by state and local grand jury selection procedures which result, whether by law or by practice, in the exclusion of a distinct segment of

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petitioners' motions to dismiss the indictment before the trial court. The federal question was also addressed in argument before the trial court. Petitioners again raised the federal question in their brief before the Kansas Supreme Court. That court specifically addressed that question in its opinion. (App. 9a, 12a-14a.)

the relevant community.[6] *E.g., Arnold* v. *North Carolina,* 376 U.S. 773 (1964); *Patton* v. *Mississippi,* 332 U.S. 463 (1947); *Hill* v. *Texas,* 316 U.S. 400 (1942). Likewise, the systematic underrepresentation of a particular segment of the community in the pool of potential grand jurors has been found to violate the Equal Protection Clause. *Smith* v. *Texas,* 311 U.S. 128 (1940).

Moreover, only recently, in *Peters* v. *Kiff,* 407 U.S. 493 (1972), the Court held a white petitioner could challenge his state conviction on the grounds that Negroes were systematically excluded from the grand jury which indicted him and the petit jury which convicted him. A plurality of this Court emphasized that " '[a] fair trial in a fair tribunal is a basic requirement of due process,' " 407 U.S. at 501,[7] and observed that "[e]ven if there is no showing of actual bias in the tribunal, this Court has held that due process is denied by circumstances that create the likelihood or appearance of bias," 407 U.S. at 502. Against this background, it was then stated:

> "These principles compel the conclusion that a State cannot, consistent with due process, subject a defendant to indictment or trial by a jury that has been selected in an arbitrary and discriminatory manner, in violation of the Constitution and

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[6] Of course, the Federal Constitution does not require a state to proceed by way of grand jury indictment in instituting criminal proceedings in its own courts. Hurtado v. California, 110 U.S. 516 (1884). Once, however, a state employes grand juries, it must choose them in accordance with federal constitutional standards. *See, e.g.,* Carter v. Jury Commission, 396 U.S. 320, 330 (1970).

[7] Quoting from the opinion of the Court in *In re Murchison,* 349 U.S. 133, 136 (1955).

> laws of the United States. Illegal and unconstitutional selection procedures cast doubt on the integrity of the whole judicial process. They create the appearance of bias in the decision of individual cases, and they increase the risk of actual bias as well." 407 U.S. at 502-03.

Last Term in *Taylor* v. *Louisiana,* 419 U.S. 522, 532 n.12 (1975), these plurality views were adopted by the Court. Indeed, in *Taylor,* this Court quoted with apparent approval not only the conclusion recited above, but also the following additional remarks from the *Peters* plurality opinion:

> " 'Moreover, we are unwilling to make the assumption that the exclusion of Negroes has relevance only for issues of race. When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.' " 419 U.S. at 532 n.12, *quoting from* 407 U.S. at 503.

Accordingly, the Court concluded that "the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." 419 U.S. at 538.

In short, under the provisions of the Fourteenth Amendment, petitioners were entitled to a grand jury selected from a source which reasonably reflected a fair cross section of the community, without the exclusion or the systematic underrepresentation of members of any substantial, discernible segment thereof. *E.g., Brown* v. *Allen,* 344 U.S. 443, 474 (1953); *Smith* v.

Texas, supra, 311 U.S. at 130; *King* v. *Cook*, 298 F. Supp. 584 (N.D. Miss. 1969). Instead, they were indicted by a grand jury selected solely from a source list which necessarily had the effect both of excluding totally from jury service a "large and identifiable segment of the community," namely, the qualified but unregistered voters of Shawnee County, Kansas, and of systematically underrepresenting significant segments of the community.

2. It is a simple, unavoidable fact that substantial numbers of Americans do not register to vote.[8] This case provides ample illustration of that fact. Thus, while there were 125,929 persons residing in Shawnee County, Kansas, who were eligible to vote on January 1, 1973, only about 60 percent of those persons were registered when the grand jury array in question here was selected. (App. 44a.) In other words, the grand jury array was compiled from a list which, at the outset, excluded approximately 40 percent of the potential jurors in Shawnee County. This excluded block of citizens of Shawnee County, Kansas, would seem to be, as much as any group, a "large and identifiable segment" of the relevant community.

Considering this group in the abstract, one cannot state with certainty what community values are lost by their exclusion, although the failure of members of the group to register to vote bespeaks an attitude toward the State and its agencies (including the prosecutorial arm) which would not be irrelevant to defendants

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[8] The Bureau of Census reported that only 69.2 percent of the eligible population was registered to vote in the 1968 presidential election. Statistical Abstract of the United States 368 (1970). See also Final Report, Survey of Non-Election Uses of Voter Registration Lists 7 (G.A.O. April 14, 1975).

in criminal cases. But such uncertainty as to the values lost by the exclusion of such a large segment of a community from the jury pool is not dispositive of the issue raised here. The class excluded here would seem at least as likely to have brought a diversity of values to a jury's deliberative processes as the other classes—daily wage earners,[9] women,[10] and persons not owning real property[11]—whose exclusion has previously been condemned by this and other courts. Moreover, as recognized in *Taylor* v. *Louisiana*, 419 U.S. at 532 n.12, and *Peters* v. *Kiff*, 407 U.S at 503-04:

> "It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude . . . that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented."

We submit, then, that the crux of the matter here must be that when a particular jury-selection system automatically excludes an identifiable segment of the community as large as the group at issue in this case, there arises such a substantial likelihood that a fair cross section of the community is not being used in selecting the array as to compel the conclusion that the system cannot meet federal constitutional standards.[12] Indeed, this conclusion would seem neces-

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[9] Thiel v. Southern Pacific Co., 328 U.S. 217 (1946).

[10] Ballard v. United States, 329 U.S. 187 (1946).

[11] Leggroan v. Smith, 498 F.2d 168 (10th Cir. 1974).

[12] *Cf.* United States v. Hunt, 265 F. Supp. 178, 201 (W.D. Tex. 1967), *aff'd*, 400 F.2d 306 (5th Cir. 1968), *cert. denied*, 393 U.S. 1021 (1969), suggesting that if the voter registration lists were to be used to develop a federal jury pool for Bexar County, Texas, it would be necessary "to supplement the voter registration list with several hundred suggesters" in order to comply with the federal

sarily to follow from the well established principle that due process is denied not only by circumstances that make for actual bias but also "by circumstances that create the likelihood or appearance of bias." 407 U.S. at 502.[13]

The court below apparently thought it a sufficient answer to the constitutional challenge made here to observe that unregistered voters have, in effect, voluntarily eliminated themselves from the pool of prospective jurors. (App. 13a-14a.)[14] But that answer is plainly insufficient. The issue in this case does not concern the constitutional rights of the citizens excluded from jury duty; rather, the issue is the petitioners' rights under the Fourteenth Amendment to have their cases considered by a jury drawn from a source which reflects a fair cross section of the community. As one federal court has observed in the course of condemning the use of voter registration lists as the sole source of jury rolls:

> "To [the defendant] it is a matter of indifference as to whether a diminished pool is due to action or inaction of third persons, whether public or private. In substance, the defendant is entitled to re-

policy (28 U.S.C. § 1861) that grand and petit juries "be selected at random from a fair cross-section of the community," since the County's voter registration contained the names of only approximately 200,000 of the some 400,000 people qualified for inclusion in the jury pool.

[13] *See also, e.g.*, Estes v. Texas, 381 U.S. 532, 541-47 (1965); Turner v. Louisiana, 379 U.S. 466, 473-74 (1965).

[14] This is the theory which principally underlies the three decisions upon which the court below relied. See United States v. Lewis, 472 F.2d. 252, 256 (3rd Cir. 1973); Camp v. United States, 413 F.2d. 419, 421 (5th Cir.), *cert. denied*, 396 U.S. 968 (1969); United States v. Anzelmo, 319 F. Supp. 1106, 1112-13 (E.D. La. 1970).

quire that the public officials charged with jury selection . . . proceed in such a way as to compel the calling of all eligible for jury duty who do not have socially valid excuses." *United States* v. *Burkett*, 342 F. Supp. at 1265.

This view was effectively accepted in *Taylor* v. *Louisiana, supra.* There, this Court addressed a defendant's challenge to the constitutionality of a Louisiana jury-selection system which "provided that a woman should not be selected for jury service unless she had previously filed a written declaration of her desire to be subject to jury service," 419 U.S. at 523, and had no difficulty in concluding that the Louisiana system which "operate[d] *to exclude* from jury service an identifiable class of citizens constituting 53% of the eligible jurors in the community" violated the *constitutional rights of the defendant.* 419 U.S. at 526-27 (emphasis added). A system which similarly has operated through the inaction of the citizens of Shawnee County to exclude an identifiable class constituting some 40 percent of the eligible jurors of the county impinges no less upon the constitutional rights of the petitioners in this case.[15]

3. Wholly apart from the exclusion in this case from petitioners' jury of the "large and identifiable segment" of the community consisting of unregistered voters, the trial court's findings established that there

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[15] While *Taylor* was concerned specifically with the unconstitutional exclusion of women in the selection of a petit jury in violation of the Fourteenth and the Sixth Amendments to the Constitution and while this case involves the question of the exclusion of grand jurors in violation of the Fourteenth Amendment, this Court recognized long ago that the "[p]rinciples which forbid discrimination in the selection of Petit Juries also govern the selection of Grand Juries." Pierre v. Louisiana, 306 U.S. 354, 362 (1939).

were other well-recognized, "identifiable segments" of the community which were systematically underrepresented in jury pools derived solely from voter registration lists.

Thus, in granting petitioners' motions to dismiss the indictment in this case, the trial court found on undisputed evidence that the citizens appearing on voter registration lists are disproportionately "white, members of the Jewish, Catholic, Presbyterian and other Protestant and established religious beliefs, well-educated or higher educated citizens than average, middle-age citizens and men," while those citizens not appearing on such lists are or tend to be "members of the minority races or ethnic background, women, members of certain fundamentalist religious orders and beliefs, persons of low economic status, persons of low education levels, young citizens basically 18-25 years of age and old citizens." (App. 44a.) The state supreme court did not take issue with these findings by the trial court; indeed, it specifically acknowledged that the "[d]efendants here did make a showing that certain groups tended not to register as voters." [16] (App. 12a.)

Notwithstanding this showing, the supreme court reversed the trial court's decision granting the motion to dismiss the indictment. It did so, however, without

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[16] *See* ABA Comm. on Standards of Judicial Administration: Management of the Jury System 13 (1975):

> "Since it has been estimated that fifty percent registration of eligible voters is about the best that can be expected on the average, the exclusive use of voter lists is highly selective. Furthermore, surveys have shown that people tend not to register until well into their twenties and that lower income and ethnic minority groups are usually underrepresented on voter registration lists."

See also United States v. Burkett, 342 F. Supp. at 1265-66.

giving any consideration to the legal significance of the showing which had been made before the trial court.[17]

Yet since a state is constitutionally barred from employing a jury-selection process that results in the systematic underrepresentation of racial minorities, whether or not a specific discriminatory intent is proved, *see, e.g., Carter* v. *Jury Commission, supra,* 396 U.S. at 329-330; *Smith* v. *Texas,* 311 U.S. 128 (1940), surely it may not underrepresent that minority through devices—such as exclusive reliance on a voter registration list—which are shown on the record necessarily to operate in that fashion.[18] In either case, the effect is the same—the unconstitutional exclusion or underrepresentation of an identifiable segment of the community, thereby depriving the defendant of his right to the presence of a fair cross section of the community on the list from which the jury is drawn.

The findings of the trial court in this case indicate that the jury-selection process employed in Shawnee County necessarily operated with just this effect. The issue of using only a voter registration list and thereby underrepresenting within the jury pool various identifiable segments of a community warrants plenary consideration by this Court.

4. There is a further element in this case which makes it particularly appropriate for the exercise of

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[17] The court focused solely on the broad issue whether it is unconstitutional, as a general matter, to use a voter registration list as the sole source for names of prospective jurors. (App. 12a-14a.)

[18] *Accord,* Leggroan v. Smith, 498 F.2d 168 (10th Cir. 1974); King v. Cook, 298 F. Supp. 584 (N.D.Miss. 1969); United States v. Hoffa, 196 F. Supp. 25 (S.D.Fla. 1961). *See also* Rabinowitz v. United States, 366 F.2d. 34, 59 (5th Cir. 1966) ("The focus of the law is on the list from which the jury is drawn and not on the composition of a particular jury or grand jury.").

this Court's certiorari jurisdiction. Unlike some other cases, where a state might be in a position to advance arguments of administrative convenience or the like in justifying the use of voter registration lists as the sole source for selection of jurors, here no such argument can be made. The State of Kansas has, through its legislature, specifically declared that:

> "The public policy for this state is . . . that all litigants entitled to trial by jury shall have the right to jurors selected at random from a fair cross section of the community . . . ." 3A Kan. Stat. Ann. § 155.

Pursuant to this declaration of public policy, the legislature has directed that:

> "Jury lists shall be prepared from voter registration records *and* enumeration or census records of the county in accordance with the intent and purpose of this act . . . ." *Id.* § 162 (emphasis added).[19]

Moreover, subsequent to the filing of petitioners' motions to dismiss, Shawnee County commenced utilizing its census list to supplement voter registration lists for purposes of juror selection.[20] (R. 53.) Accordingly,

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[19] Since it does not present a federal question, we merely refer to the opinion below as to the manner in which the Kansas Supreme Court attempted to reconcile the jury selection practices of Shawnee County with the terms of the Kansas statute. (App. 9a-12a.)

[20] While this change in procedure in Shawnee County mooted the issue of jury selection with respect to the composition of petitioners' petit jury, this *post hoc* action does not in any sense diminish the significance of the questions raised in this petition. For it is clear that use of voter registration lists as the sole source for selection of both grand and petit juries is a common phenomenon in the United States today. *See, e.g.*, Leggroan v. Smith, 498 F.2d 168, 170 (10th Cir. 1974) (Salt Lake County, Utah); King v. Cook,

no argument turning upon practical necessity or the like can be advanced by the State for the utilization of only voter registration lists in the selection of the grand jury which indicated the petitioners.

CONCLUSION

Petitioners submit that in cases such as the present one, where the jury-selection process automatically excludes some 40 percent of the eligible jurors from consideration for selection, it is impossible to conclude that the Constitution's demand that juries be drawn from sources containing a fair cross section of the community is satisfied. In such circumstances, the likelihood that values common to the community will be significantly underrepresented or not represented at all simply is too great to meet the standard of due process heretofore recognized by this Court. This is particularly true where, as here, the trial court found on uncontradicted evidence that the persons excluded generally consist of a disproportionately large number of persons who are members of racial minorities and other similar identifiable segments of the community, and where the State can offer no justification for the use of the selection procedure which had this effect.

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298 F. Supp. 485, 486 (N.D. Miss. 1969) (Quitman County, Mississippi); State v. Willis, 33 Ohio Misc. 159, 293 N.E.2d 895 (1972) (Akron, Ohio); 17 Pa. Stat. Ann. § 1252(a) (1962) (First class counties of Pennsylvania); National Center of State Courts, Court Room Improvement Programs: A Guidebook for Planners 35-36 (1972) (Harris County, Texas); The District of Columbia Judicial System 40 (The National Center for State Courts 1972) (District of Columbia); The State of Maryland Judicial System 68 (The National Center for State Courts 1975).

Accordingly, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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